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No. 75-21

IN THE SUPREME COURT OF THE UNITED STATES

-------- Term, 1975

PEOPLE OF THE STATE
OF MICHIGAN,
Petitioner,

vs.

EDWARD BEAVERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

NOW COMES Peter E. Deegan, Prosecuting Attorney in and for the County of St. Clair, State of Michigan, by Peter R. George, Chief Appellate Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on April 7, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reported at 393 Mich 554, ... NW 2d ..... (1975) and is appended as Appendix "A". The opinion of the Court of Appeals of Michigan is unreported but appears in the Appendix hereto as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on the 30th day of March, 1973. The judgment of the Supreme Court of Michigan was entered on April 7, 1975. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

I.

Whether the definition of the word "search" by the United States Supreme Court is binding upon the Michigan Supreme Court under the Supremacy Clause of the United States Constitution.

II.

Whether the Supreme Court of the State of Michigan may purposefully evade Federal constitutional definitions and rules of law by transparent assertions of independent state grounds.

III.

Whether the Supreme Court of the State of Michigan violated federal guarantees of due process of law where it acted contrary to express requirements of the Michigan Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the following United States constitutional provisions:

A) Article 4, Section 4, which provides as follows:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

B) Article 6, which provides as follows:

"All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be public Trust under the United States."

C) Amendment IV, which provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

D) Amendment XIV, Section 1, which provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Petition involves Michigan Constitution of 1963, Article 1, Section 11:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this

section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

STATEMENT OF FACTS

Defendant Edward Beavers was convicted by a jury of sale of heroin. At approximately 5:00 o'clock p.m. on December 6, 1970, Lt. Joseph Eastwood of the Port Huron Police Department saw defendant's car unattended in his driveway and decided to attempt a narcotics purchase. He then picked up informant Ronnie Parker at his hotel and concealed a small transmitter under the informant's shirt. The informant walked to defendant's residence and, after knocking on the door, was greeted by defendant's son and was subsequently invited into the home by defendant. While in defendant's home, he bought two packets of heroin from defendant. Lieutenant Eastwood and another police officer, Herman Dusellier, heard the transaction from the informant's transmitter, on receivers in their car.

At defendant's trial, Lt. Eastwood, Officer Dusellier and informant Ronnie Parker all testified. Ronnie Parker testified as to the purchase and made an in-court identification of the defendant as the person from whom he made the purchase. Officer Dusellier testified that he could identify the informant's voice and that he heard him talking to two subjects, but did not identify the subjects. Lieutenant Eastwood testified that he was familiar with the defendant's voice, having heard it on several occasions, and that he heard the informant call the defendant by name and that he could identify the defendant's voice in conversation with the informant.

The defense was alibi.

The Court of Appeals on March 30, 1973 affirmed the case in a memorandum opinion. On April 7, 1975 the Supreme Court of Michigan reversed the defendant's conviction.

REASONS FOR GRANTING THE WRIT

The questions presented by Petitioner are substantial Federal Constitutional issues which have yet to be addressed by this Court and which have been erroneously answered by the Supreme Court of Michigan.

I.

When is a search not a search is a search?

The operative words of the Bill of Rights have become more than the sums of their lexoconic parts; they are symbols of the most fundamental concepts, and the cornerstones insuring our most precious liberties. For this reason the United States Supreme Court has been and must continue to be the final and authoritative determiner of those concepts. A state, through legislation or court order, cannot fundamentally alter these most basic concepts by the expedient of definition.

One such concept is "reasonable expectation of privacy", a term which has come to embody that fundamental interest protected from governmental intrusion (a search and/or seizure) by the Fourth Amendment, *Katz* v *United States,* 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), *United States* v *White,* 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971). This Court has authoritatively determined that participant (third-party) monitoring, like voluntary conversation with an unsuspected informant does not come within the shadow of this protected area. *United States* v *White,* 401 US 745, 752-753; 91 S Ct 1122; 28 L Ed 2d 453, 459-460 (1971). The Michigan Supreme Court has ruled that a citizen within its borders does have a reasonable expectation of privacy in identical circumstances. *People* v *Beavers,* 393 Mich 554 .... NW 2d .... (1975). To allow that decision to stand is to hold this fundamental Constitutional concept as fluid as the boundaries of the several states, as amorphous as the unknown State-or-Federal identity of the third-party monitor.

The Michigan Supreme Court's decision in *People* v *Beavers* does more than advocate a State's power to redefine such fundamental concepts as search, confession, or

speech. This Court's decision in *White, supra,* impliedly exempts the electronic surveillance activity which occurred herein from the protective, and preemptive (See: *United States* v *Tortorello,* 480 F 2d 764 (1973), *State* v *Stein,* 515 P 2d 1211 (Kan. 1973), *Ansley* v *State,* 185 SE 2d 562, 124 CA App 670 (1971)) provisions of TITLE III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 State 212, 180 SC Sec. 2510 *et seq,* which defines oral communication as:

> "(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."

and evidences a clear Congressional intent to let this Court's decisions determine and define justifiable expectations of non-interception. *United States* v *Tortorello,* 480 F 2d 764 (1973).

> "Title III was drafted to delineate a uniform basis for authorizing electronic surveillance in compliance with the standards set forth in *Katz* v *United States* (1967), 389 US 347 (88 S Ct 507, 19 L Ed 2d 576). Intrastate phone calls are governed by it. *Weiss* v *United States* (1939), 308 US 321 (60 S Ct 269, 84 L Ed 298)."
>
> *People* v *Tebo,* 37 Mich App 141, 147-150 NW 2d (1971).

One Michigan court has already correctly opined that application of the act to a given electronic surveillance hinges upon the subject's reasonable expectation or privacy as that has been bounded by the Fourth Amendment as interpreted by this Court. *Sponick* v *Detroit Police Department,* 49 Mich App 116, 197-198; 211 NW 2d 539 (1973). The Michigan Supreme Court has thus made Title III applicable in a situation where the Congress of the United States and this Court have refused to do so, a result contrary to a basic understanding of the preemption doctrine.

The *Beavers* decision arguably makes a Michigan federal criminal defendant immune from the *White* decision as well. For the logic behind a defendant's assertion "it was

reasonable to expect my privacy was free from such intrusion under *Beavers*" seems irrefutible if this Court allows the decision to stand. An unwarranted federal "eavesdropping", federally constitutionally valid under *White* v *United States,* would violate the defendant's State Constitutional rights.[1]

The Supreme Court of the United States has shown a prudent and rational regard for the proper relationship between the State and Federal judicial system. Continued comity for those decisions does not require this Court to abrogate its clear Constitutional authority to espouse the parameters of those concepts indispensible to the preservation of our ordered liberties (See II *infra*). There can logically be but one definition of a Constitutionally reasonable expectation of privacy — that given by this Court and adopted by the United States Congress when it preempted control of this area.

A search is a search is a search.

II.

This Court has expressed the view that a state may, "as a matter of its own law, impose greater restrictions on police activity than those this Court holds to be necessary under Federal constitutional standards". *Oregon* v *Hass,* 95 S Ct 1215 (1975). However, also made manifest in the *Hass* decision is this Court's view that "a State may not impose such greater restrictions as a matter of federal

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[1] as would an "eavesdropping" done in substantial conformity with *State* warrant requirements, since 18 USC 2510 *et seq.* has preemptively determined the only manner in which such surveillance may be done, unless specific State Statutory provision is made, 18 USCA 2516 (2), *State* v *Stein,* 515 P 2d 1211 (Kan. 1973), *United States* v *Tortorello,* 480 F 2d 764 (1973), something Michigan's legislature has refused to do, MCLA 750.539(a); MSA 28.-807(1), specifically exempting the area from State legislative concern.

constitutional law when this Court specifically refrains from imposing them".

In *People* v *Beavers,* the Michigan Supreme Court not only failed to analyze, discuss or base its decision on any state statute or constitutional provisions, but the court also decided the case contrary to the policy of the People of the State of Michigan as expressed in Michigan Constitution of 1963, Article 1, Section 11. The footnote reference to Michigan Constitution of 1963, Article 1, Section 1, the only specific reference to Michigan law in the Michigan Supreme Court's decision in *Beavers,* failed even to set forth the entire section by the omission of the following language which contains the spirit of the particular constitutional provision and which refutes the establishment of an exclusionary rule in a case dealing with narcotic trafficking:

> "The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this State."

Thus, the misquotation avoids the very language that would have settled the question if it had been decided on state grounds. In reality the *Beavers* decision is an analysis of and rejection of this Court's decision in *White, supra.*

In effect, this Court's decision in *Oregon* v *Hass, supra,* is a recognition of the principle that a State Supreme Court may not evade Federal Constitutional definitions and rules of law by transparent assertions of State grounds. For despite the cautionary language of footnote 4, this Court has impliedly determined Fifth Amendment law to supercede a State Constitutional provision of identical conceptual scope. If this is not true, then the Oregon Supreme Court may avoid application of the dictates of *Hass* by the simple expedient of reconsideration of the case under the State Constitution. Such action would provide an "adequate state ground" which was available when this Court granted certiorari in *Hass,* and would make the *Hass*

opinion but advisory, since it was not outcome determinative. Your Petitioner suggests this Court should be no more confused by the Michigan Supreme Court's gratuitous, minimal, and transparent citation of state authority, than it would have been in *Hass* if the camouflaging reference in *State* v *Hass,* 2670, 489, 492; 517 P 2d 671, 673 (1973), to reconsideration of a "state ground" based decision [*State* v *Brewton,* 247 or 241, 422 P 2d 581, cert den 387 US 943, 87 S Ct 2074; 186 L Ed 2d 1328 (1967)] had been elaborated upon.

III.

Insofar as searches and seizures within Michigan do not violate the Federal Constitution, Article 1, Sec. 11 prevails. Article 1, Sec. 11 is valid to the extent that it does not violate Federal constitutional law. *People* v *Moore,* 391 Mich 426, 435 (1974).

In *People* v *Beavers,* the Michigan Supreme Court abridged the Michigan Constitution without authority to do so. In fact, as pointed out in II above, the Michigan Supreme Court misquoted the Michigan Constitution by omission. The Court thus refused to acknowledge the People's expression of their own policy on this constitutional issue. The Court established, contrary to the expressed words of the Michigan Constitution, an exclusionary rule in a case dealing with narcotic trafficking. The policy of the Michigan Constitution is expressly stated in Article 1, Sec. 11, and precludes any exclusionary rule, subject only to the U.S. Constitution. *People* v *Moore,* 391 Mich 426, 435 (1974). The court simply refused to enforce and uphold the Constitution, in violation of U.S. Const, Art. 4, Sec. 4, U.S. Const, Amend 4, Amend 14.

CONCLUSION

WHEREFORE, the Petitioner, the People of the State of Michigan, respectfully submit that for the foregoing reasons, the Supreme Court of the State of Michigan has

rendered a judgment in this cause which is contrary to the Constitution of the United States, the Constitution of the State of Michigan and the decisions of this Honorable Supreme Court of the United States of America, so that a Writ of Certiorari should be granted.

Respectfully submitted,

PETER E. DEEGAN
Prosecuting Attorney, St. Clair County, State of Michigan

PETER R. GEORGE
Chief Appellate Attorney

APPENDIX "A"

NOTE: Where possible, a syllabus (headnote), such as this, will be released at the time the opinion is released. This syllabus is *not* a part of the opinion of the Court but has been written by the Supreme Court Reporter as a summary of the case for the convenience of readers. See *United States* v *Detroit Lumber Company*, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

PEOPLE v. BEAVERS

Docket No. 54847. Argued May 10, 1974 (Calendar No. 16). — Decided April 7, 1975.

Edward Beavers was convicted by a jury in the St. Clair Circuit Court, Kenneth J. Stommell, J., of sale of heroin without a license. Two police officers monitored the conversation between the defendant and a police informant carrying a battery-operated radio transmitter under his shirt while the informant bought heroin from the defendant in defendant's home. Both officers testified about the conversation at trial. The Court of Appeals, Quinn, P.J., and Bronson and Van Valkenburg, JJ., affirmed (Docket No. 13215). Defendant appeals, arguing that monitoring of his conversation with the informant was an unreasonable search and seizure. *Held*:

1. An investigatory action such as the one in this case in which communications directed to particular persons are simultaneously being intercepted by a third party (participant monitoring), constitutes a search and seizure which can be constitutionally justified only if a valid search warrant is issued, unless the prosecution can carry the burden of justification of an exception to the warrant requirement.

2. A search and seizure conducted without prior approval by an independent magistrate is per se unreasonable and its fruits are inadmissible at trial and, un-

der the facts of this case, in which the circumstances are not unique so as to fall within any of the recognized exceptions to the warrant requirement, a search warrant should have been issued prior to instituting the participant monitoring procedure.

3. The decision in this case is to be applied prospectively.

4. Defendant's contention that the sentence of 20 to 40 years imprisonment constitutes cruel and unusual punishment is reviewable in light of 1971 PA 196 which establishes the maximum term of imprisonment as not more than 20 years.

Reversed and remanded for a new trial.

M. S. Coleman, J., dissented on the ground that the Constitution of the United States has not been construed to prohibit such electronic monitoring, and the Court should assign proper weight to opposing interests and give some consideration to public policy before imposing controls under the state Constitution which are stricter than those required by the United States Constitution. In this case, the defendant had no justifiable expectation of privacy in carrying out his sale of heroin, and the police officers interferred with no legitimate constitutional interest.

OPINION OF THE SUPREME COURT OF MICHIGAN

(Filed April 7, 1975)

16/May/1974
No. 54847

BEFORE THE ENTIRE BENCH
J. W. Fitzgerald, J.

Defendant was convicted by a jury of the sale of heroin[1] and received a sentence of from 20 to 40 years imprisonment. The Court of Appeals affirmed the conviction and we granted leave to appeal.

Ronny Barker, a police informant, was cooperating with the Port Huron Police Department in their efforts to control the trafficking of narcotics. On December 6, 1970, he was contacted by Sgt. Joseph Eastwood and asked to participate in a controlled purchase of narcotics from the defendant. Barker and Officer Eastwood then picked up Lt. Herman Dusellier and proceeded to a parking lot where Barker was thoroughly searched by the two officers. A battery-operated radio transmitter was then installed underneath his shirt. This apparatus was designed to transmit sounds from Barker's immediate vicinity to a receiver, or "walkie-talkie", which was located in Officer Eastwood's unmarked car. The transmitter attached to Barker had no receiving capabilities and could only transmit sounds originating from the vicinity occupied by Barker. Informant Barker was also provided with a supply of money with which to make the purchase.

Barker testified that he and the two officers proceeded in Sgt. Eastwood's personal vehicle to 23rd and Cleveland in Port Huron, arriving at approximately 5:55 p.m. He walked a short distance to defendant's apartment building and knocked on the rear door. Defendant's son answered and Barker asked to see "BeeBee", the name with which he identified the defendant. When the defendant approached, Barker inquired "if he had anything". Defend-

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[1] The statute in effect at the time of sentencing, MCLA 335.152; MSA 18.1122, has been repealed by 1971 PA 196 and is now MCLA 335.341; MSA 18.1070(41).

ant responded by saying he had some "Jones", a term used to describe heroin.

When asked by defendant how much he wanted to buy, Barker indicated "a dime bag", or ten dollars worth. Defendant stated "okay" and produced two aluminum foil packets containing heroin, handing them to Barker in exchange for ten dollars. Barker returned to the car and handed the two foil packets over to Sgt. Eastwood.

Officer Dusellier testified that he accompanied Barker and Sgt. Eastwood to the vicinity of defendant's apartment. He observed Barker approach defendant's apartment and, by listening to the "walkie-talkie", was able to identify Barker's voice along with two unidentifiable others. At no time did Lt. Dusellier see the defendant.

Officer Eastwood testified that his preliminary investigations revealed that defendant was involved in drug trafficking. He observed defendant's light blue 1964 Cadillac parked in front of his apartment approximately one hour before the purchase and prior to his rendezvous with Barker and Lt. Dusellier. Sgt. Eastwood stated, as did Barker, that he and Officer Dusellier remained in his unmarked car monitoring the conversation between Barker and defendant. He testified that he was familiar with defendant's voice and was able to identify it as such. At no time did Officer Eastwood see the defendant.

The testimony of Barker and the two investigating officers was contradicted by several defense witnesses. Lettie Myers, defendant's mother-in-law, tesitfied that she was in the apartment of defendant the entire day and most of the evening on December 6, 1970. No one came to the door during that period. She observed defendant, his wife and son, and a man named John leave for Detroit in defendant's car about 9 a.m. and didn't see them again until their return at approximately 11:30 p.m. Adeline Beavers, defendant's wife, testified that she accompanied her husband, son, and John Salhudinn as they left their apartment at approximately 9 a.m. on the morning of December 6, 1970 with Detroit as their destination. While enroute, their car began to emit heavy smoke. Defendant left his car to be repaired at a service station in the custody of a man by the name of "Nate". She stated she had never before visited the station. She further testified that the four of them proceeded by taxi to the home of defendant's mother. Defendant and John journeyed back to the service station soon after their arrival at his mother's home and remained there until approximately 7 o'clock that evening. Defendant and John returned to his mother's home to visit and they departed later, arriving back at defendant's apartment at approximately 12 midnight.

John Salhudinn testified that he travelled with defendant and his family to Detroit on December 6, 1970 for the purpose of visiting a Muslim temple. However, he stated, as did Adeline Beavers, that he returned to Nate's service station with defendant at approximately 11 a.m. and waited with defendant throughout the entire afternoon until the car was repaired. At approximately 7 p.m., he and the defendant returned to defendant's mother's house.

Nathaniel ("Nate") Thomson, the operator of the service station, testified that defendant's car was not functioning properly as they entered his station on the morning of December 6, 1970. He did not recall defendant leaving the station, but did state that defendant and another person remained there throughout the afternoon until the car was repaired, which was approximately 7 p.m. Witness Thomson further testified that he knew defendant for approximately 10 years and, contrary to the testimony of defendant's wife, stated that he had seen Adeline Beavers quite a few times at the service station. The testimony of Adeline Beavers was further contradicted by Thomson's statement that the car contained two young girls when first entering the station.

Robert Smith, defendant's brother-in-law, who lived in the flat below defendant's mother, testified that he first saw defendant and his wife at 7:30 on the evening of December 6, 1970 in his own apartment. He recalled defendant and his family along with another man leaving at approximately 9:45 that evening.

Defendant was arrested six days after the alleged transaction. Following a four-day trial, the jury found defendant guilty of the sale of heroin.

It is argued that defendant was denied the right to freedom from an unreasonable search and seizure when a police officer testified, over objection, to a conversation be-

tween defendant and a police informant equipped with a concealed transmitter which was relayed to the officer without defendant's knowledge and without authorization of a search warrant. Defendant contends that the Supreme Court decision in *Katz* v *United States,* 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), expanded the right to privacy to include freedom from the uninvited ear through instantaneous monitoring of a conversation thought to be privileged. The people argue that *United States* v *White,* 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971), is controlling. There, the Court found no distinction between the possibility that a law enforcement agent *without* electronic equipment might subsequently reveal the contents of a conversation to others and the possibility that the same conversation is simultaneously being transmitted to a third party. In neither instance did the Court find an invasion of defendant's constitutionally justifiable expectation of privacy. Further elaboration of these opposing positions convinces us that under the facts of this case a search warrant should have been issued prior to instituting this specific participant monitoring procedure.[2]

We are acutely sensitive to the fundamental interests involved when prevailing law enforcement techniques are balanced against protections guaranteed citizens under the state and Federal constitutions. With the advent of increasingly sophisticated electronic surveillance equipment, the evolving body of law which seeks to reconcile the need for effective police investigative practices in combating criminal activity with the ominous spectre of the Orwellian Big Brother is fraught with complexities. Extensive commentary must, however, yield to a specific discussion of the

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[2] Where the phrase "participant monitoring" appears, we specifically refer to the use of an electronic device *by a participant* of a conversation which transmits the exchange to a third party. We do not address those situations which include a participant himself *recording* the conversation or the use of an electronic device by a *third party only* to eavesdrop upon a conversation between two parties, one of whom is cooperating with the authorities.

issue before us. We deal here with the constitutional validity of a warrantless electronic surveillance conducted by local police officers assisted by an informant equipped with an electronic transmitter which permitted off-premises monitoring of defendant's incriminating statements uttered in his own home. No permanent recording of the conversation exists. Defendant objects to the admissibility of a police officer's corroborating testimony regarding the contents of the monitored conversation.

The Supreme Court's plurality opinion in *United States* v *White, supra,* involved the identical issue and set forth an exhaustive analysis of participant monitoring. The Court reinstated defendant's conviction by ruling admissible the testimony of government agents regarding an electronically transmitted account of incriminating statements made by defendant during a conversation with a police informant. Four justices disagreed. Justice White, joined by three others, perceives participant monitoring as a variant of the privilege of a party to repeat a conversation. He believes the use of electronic equipment does not create a constitutional barrier which would prevent an agent from disclosing to a third party the contents of an exchange between himself and another. Conversely, Justice Harlan considers paramount the privilege of one participating in a conversation to control the extent of his communications.[3] His position is that one's expectation of privacy should not be subjected to the possibility that communications directed to particular persons are simultaneously being intercepted by a third party. He maintains that such investigatory action constitutes a search and seizure which can be constitutionally justified only if a valid search warrant is issued. We view the latter pro-

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[3] In adopting this position, Justice Harlan also expresses Justice Douglas' concern that the dangers inherent in the unrestricted use of electronic surveillance have a considerable chilling effect upon the free exchange of communication, and Justice Marshall's insistence that the safeguards of the warrant requirement must accompany investigative conduct.

position as being more consistent with the spirit of the state constitutional protection against unreasonable searches and seizures.[4]

We are not prepared to rule that one's misplaced confidence in a disguised police informant who instantaneously transmits a conversation to law enforcement authorities deprives the conversation of its private character. Justice White's analysis supporting this view proceeds as follows:

(1) Law enforcement agencies have authority to utilize police informants in order to obtain incriminating physical evidence from a defendant in his own home.[5]

(2) One who communicates directly with another assumes the risk that the exchange will be repeated to a third party;[6]

(3) Federal agents may simultaneously record or transmit their direct conversations with suspected criminals and later offer testimony regarding the exchanges into evidence;[7]

(4) If police agents, *acting alone,* can engage in lawful, warrantless investigating activity, it follows that courts should not erect barriers to the admissibility of relevant, probative evidence of wrongdoing simultaneously monitored by a third party who later testifies as to what he heard.[8]

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[4] Const 1963, art 1, § 11: "The persons, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

[5] *Lewis* v *United States,* 385 US 206; 87 S Ct 424; 17 L Ed 2d 312 (1966).

[6] *Hoffa* v *United States,* 385 US 293; 87 S Ct 408; 17 L Ed 2d 374 (1966).

[7] *Lopez* v *United States,* 373 US 427; 83 S Ct 1381; 10 L Ed 2d 462 (1963).

Nevertheless, we are persuaded by the logic of Justice Harlan which recognizes a signficant distinction between assuming the risk that communications directed to one party may subsequently be repeated to others and the simultaneous monitoring of a conversation by the uninvited ear of a third party functioning in cooperation with one of the participants yet unknown to the other. Participant monitoring by a third party was noticeably absent in each of the cases relied upon by Justice White. We choose not to extend the constitutional bounds of misplaced confidence to encompass the threat of warrantless third-party monitoring of conversations between an unsuspecting speaker and one who knowingly transmits the communication to another. A party speaking in private conversation with another, particularly where the conversation occurs in the speaking party's residence, has not "knowingly expose[d] [this conversation] to the public"[9] because an unknown party may be surreptitiously hearing every word being spoken.

Participant monitoring is practiced extensively throughout the country and represents a vitally important investigative tool of law enforcement. Equally significant is the security and confidence enjoyed by our citizenry in knowing that the risk of intrusion by this type of electronic

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[8] As noted earlier, no tape recording of the conversation exists in the instant case. Nor did one exist in *White.* Justice White views *participant* recording and *third party monitoring* as being similar in nature, both constituting reasonable investigative efforts inviolate of the Fourth Amendment.

[9] The statement in *Katz, supra,* 351, that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection", must refer to the risk taken by the speaker, that the *person with whom he communicates* may broadcast it's contents to the world.

surveillance is subject to the constitutional protection against unreasonable searches and seizures. By interposing the search warrant requirement prior to engaging in participant monitoring, the risk that one's conversation is being intercepted is rightfully limited to circumstances involving a party whose conduct has provided probable cause to an independent magistrate to suspect such party's involvement in illegal activity. The warrant requirement is not a burdensome formality designed to protect those who would engage in illegal activity, but, rather a procedure which guarantees a measure of privacy and personal security to *all* citizens. The interests of both society and the individual should not rest upon the exercise of the unerring judgment and self-restraint of law enforcement officials. Our laws must ensure that the ordinary, law-abiding citizen may continue to engage in private discourse, free to speak with the uninhibited spontaneity that is characteristic of our democratic society.

The circumstances of this case are not unique in nature so as to fall within any of the recognized exceptions[10] to the warrant requirement. No reasons are advanced to justify departure from the mandate of the Fourth Amendment which requires strict adherence to the judicial process.[11] Given this premise, a search and siezure conducted without prior approval by an independent magistrate is

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[10] No exigent circumstances existed which would result in the loss of evidence if a warrantless search were not conducted immediately. *Schmerber* v *California,* 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966). Nor was this a search made incident to lawful arrest, *Chimel* v *California,* 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), or conducted while in hot pursuit, *Warden* v *Hayden,* 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967). Obviously, the automobile and inventory search exceptions are not pertinent. As to the consensual search exception, its inapplicability is acknowledged by our analysis of this case.

[11] *United States* v *Jeffers,* 342 US 48; 72 S Ct 93; 96 L Ed 59 (1951).

per se unreasonable and, accordingly, its fruits are inadmissible at trial.[12] In the absence of a warrant, the burden of justification is upon those seeking an exception from the warrant requirement.[13] This burden has not been carried and we must remand for a new trial.

This Court does not condemn the exercise of participant monitoring by law enforcement personnel. However, when circumstances justify the use of this surveillance technique, the resulting search and seizure must be conducted in full compliance with the warrant requirement to be properly admitted at trial. The admissibility of the informant's testimony is in no way affected by ruling inadmissible the testimony of the two police officers. The warrantless monitoring and subsequent testimony of these two witnesses renders tainted the *transmitted* account of the conversation, but does not in any way prevent the informant from testifying as to the statement spoken to him *directly.*

While the result reached today reflects an analysis of Federal case authority, our conclusion is based upon the Michigan Constitution and the protection afforded the people of this state against unreasonable searches and seizures. The decision today is to be applied prospectively.[14]

Resolution of the first issue renders unnecessary any discussion of additional issues raised by defendant.[15]

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[12] *Katz* v *United States, supra,* 357.

[13] *Chimel* v *California, supra,* 762.

[14] For a further discussion of the most recent study of electronic surveillance, *see Privacy in a Free Society,* Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, 1974, published by the Roscoe Pound-American Trial Lawyers Foundation.

[15] We do note, however, that defendant's contention that the sentence of 20 to 40 years imprisonment constitutes cruel and unusual punishment is reviewable in light of 1971 PA 196 which establishes the maximum term of imprisonment for not more than 20 years.

Reversed and remanded for a new trial.

(s) John W. Fitzgerald
(s) John B. Swainson
(s) Thomas Giles Kavanagh
(s) Charles L. Levin
(s) G. Mennen Williams
(s) Thomas M. Kavanagh

16/May. 1974
[54847]

BEFORE THE ENTIRE BENCH
M. S. Coleman, J. (To Affirm)

The principal issue is whether defendant was denied freedom from an unlawful search and seizure and an unlawful invasion of his privacy when a narcotics informant wearing a transmitter made a heroin purchase from him and the conversation leading to the "buy" was electronically overheard by two police officers without a search warrant. I would hold that there has been no violation of either the Fourth Amendment or of Const 1963, art 1, §11.[1]

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[1] US Const, Am IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Const 1963, art 1, §11

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. . . ."

The trial judge correctly admitted the testimony of the two police officers.

1.

Defendant, whose defense was alibi, was jury convicted for the sale of heroin on December 3, 1971 in St. Clair County. Ronny Barker, a police informer, was picked up at his hotel on December 6, 1970 by Joseph Eastwood of the Port Huron police department. The officer had seen defendant's light blue car unattended in his driveway and believed it a propitious time to make a narcotics purchase. His investigation had led him to believe that defendant was trafficking in drugs. Herman Dusellier, another police officer, joined Eastwood and Barker. Mr. Barker, equipped with a concealed microphone transmitting device, knocked at defendant's door and was admitted by defendant's son. He then asked to see "Bee Bee", defendant's nickname, and when defendant appeared, Barker asked "if he had anything." Defendant responded by saying that he had some "Jones", or heroin. Barker then transacted to buy "a dime bag", or ten dollars worth. After he paid defendant the money, he received two packets of heroin. Barker returned to the car and handed the packets to Eastwood.

During the transaction, the police officers remained in their unmarked car and overheard the conversation between defendant and Barker. At the trial, defendant sought to attack Barker's credibility. The officers were called to testify. One related the conversation, but did not know defendant's voice. The other positively identified defendant's voice. Both substantiated Barker's testimony. Defendant claimed he was in Detroit at the critical time. His witnesses were inconsistent. The jury returned a verdict of guilty.

2.

At the outset, I acknowledge that the state constitution means what we say it means within the confines of the doctrine of supremacy. We can, and on occasion do, interpret the state constitutional provisions as affording protections

beyond those required by the United States Supreme Court as a matter of Federal Constitutional law. I believe that there should be a pragmatic overlay of public policy considerations in each of our more restrictive holdings. There should be a clear perception of what and whom we wish to protect and preserve. Consideration should be afforded to the goods and evils along the road to a desired goal and proper weight assigned to each.

As I see it, my colleagues are primarily concerned with the right to privacy. I share their concern regarding any erosion of that right and constantly wage war against the Big Brother syndrome. However, I do not perceive the trial judge's refusal to suppress the testimony of the two police officers as an invasion of defendant's right to privacy or as an illegal search and seizure — nor would the United States Supreme Court if one may rely upon its prevailing rationale. To suppress the testimony, we then must go beyond the requirements of that Court and interpret the state constitution which has language comparable to that in the United States Constitution but is "our own."

Therefore, we should proceed to pragmatic considerations. First, we must recognize that the use of hard drugs — and resultant increased criminal activity and human misery — constitutes a major problem of this era. Law enforcement officers are charged with risking their own lives to find and arrest the "purveyors of death." We encourage citizens to help them.

Because of the inherent necessity for privacy in drug sales and the small size of the product, the law enforcement officer has a uniquely difficult task. A sale may take place anytime, anywhere, and be invisible to the observer. Case history reveals that many, perhaps most, sales take place in someone's dwelling place. The business is operated from within living quarters, as here.

Therefore, the very nature of the illegal traffic demands the use of agents and informants if it is to be controlled. However, one may make a "buy" but be met in court by a series of witnesses who swear that the defendant was somewhere else and the purchaser is lying, perhaps to save his own skin. The buyer cannot usually bring anyone with him to verify his testimony. The lone buyer is also in physical danger.

Therefore, as Justice Fitzgerald admits, "[P]articipant monitoring is practiced extensively throughout the country and represents a vitally important investigative tool of law enforcement." I would not take that tool from them.

Already this Court has minimized the total use of narcotics informants by its opinion in *People* v *Turner,* 390 Mich 7; 210 NW2d 336 (1973), in which we again went beyond the requirements of the United States Supreme Court and enlarged the defense of entrapment. More recently, in *People* v *Dixon,* 392 Mich 691; 222 NW2d 749 (1974), we suppressed evidence (heroin) seized from one lawfully arrested during a routine custodial search. Here we would strike an even more crippling blow to the apprehension of narcotics dealers.

Therefore, a careful analysis of constitutional goals and means necessary or desirable towards achievement of these goals is appropriate.

3.

Instead of peremptorily using the search warrant sword to chop the Fourth Amendment knot, we should make more of an effort to untie the strands.[2]

Issues of a similar nature have reached the United States Supreme Court. The defendant in *On Lee* v *United States,* 343 US 747; 72 S Ct 967; 96 L Ed 1270 (1952), had been accused of selling opium. While on bail before trial, he was approached by an undercover agent. The agent wore a transmitter which permitted a member of the narcotics

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[2] *See* Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation,* 68 Colum L Rev 189 (1968); Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order",* 67 Mich L Rev 455 (1969); Scoular, *Wiretapping and Eavesdropping: Constitutional Development from Olmstead to Katz,* 12 St Louis ULJ 513 (1968); and Comment, *Wiretapping and Eavesdropping: A Case Analysis,* 36 Tenn L Rev 362 (1969).

bureau, also named Lee, to monitor conversations. On two separate occasions defendant had incriminating talks with the undercover agent.

Once past this hurdle the Court said the "case involves no 'eavesdropping' whatever in any proper sense of the term." The recording device was not introduced "by means of an unlawful physical invasion" of defendant's premises but "was carried in and out by an agent who was there with petitioner's assent." After noting this case's similarity to *Rathbun* v *United States,* 355 US 107; 78 S Ct 161; 2 L Ed 2d 134 (1957),[3] the Court concluded the risk defendant took in offering the bribe "fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

Compare *Osborn* v *United States,* 385 US 323; 87 S Ct 429; 17 L Ed 2d 394 (1966), where the recording was authorized by two district court judges although a search warrant was not issued. The Court approved but did not require judicial authorization prior to consensual participation in recording of conversations.[4]

In *Lewis* v *United States,* 385 US 206; 87 S Ct 424; 17 L Ed 2d 312 (1966), a government agent obtained narcotics during transactions completed in defendant's home. The agent obtained entry "by misrepresenting his identity and stating his willingness to purchase narcotics."

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[3] In *Rathbun,* the Court held that "the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation are admissible in federal court." The decision was based on statutory interpretation; a Fourth Amendment analysis was not involved. The Court felt telephone conversers take "the risk that the other party may have an extension telephone and may allow another to overhear the conversation."

[4] *Also see Berger* v *New York,* 388 US 41; 87 S Ct 1873; 18 L Ed 2d 1040 (1967).

Acknowledging that "the home is accorded the full range of Fourth Amendment protections" the Court said when the home becomes a market place for unlawful business, "that business is entitled to no greater sanctity than if it were carried on in the store, a garage, a car, or on the street." The Court concluded with the following excerpt from the government's brief:

> " 'In short, this case involves the exercise of no governmental power to intrude upon protected premises; the visitor was invited and willingly admitted by the suspect. It concerns no design on the part of a government agent to observe or hear what was happening in the privacy of a home; the suspect chose the location where the transaction took place. It presents no question of the invasion of the privacy of a dwelling; the only statements repeated were those that were willingly made to the agent and the only things taken were the packets of marihuana voluntarily transferred to him. The pretense resulted in no breach of privacy; it merely encouraged the suspect to say things which he was willing and anxious to say to anyone who would be interested in purchasing marihuana.' "

Justices Brennan and Fortas concurred solely on the basis that defendant's apartment "was not an area protected by the Fourth Amendment as related to the transactions in the present case."

The defendant's conviction in *Hoffa* v *United States,* 385 US 293; 87 S Ct 408; 17 L Ed 2d 374 (1966), was based, in part, on the testimony of Edward Partin, an informer who frequently visited defendant's hotel room. The Court said the Fourth Amendment protects "the security a man relies upon when he places himself or his property within a constitutionally protected area."

> "In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by

> force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing."

The Court said the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

A different situation existed in *Katz* v *United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).[5] Government agents tapped the telephone wires of a booth from which defendant conversed with others, all assuming that their conversations were private. The evidence gathered by these means was introduced at trial. In reversing defendant's conviction, the Court held that the government's conduct "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted" a Fourth Amendment search and seizure. The Fourth Amendment "protects people — and not simply 'areas' — against unreasonable searches and seizures."

The Court refused to apply *Katz* retroactively. *Desist* v *United States*, 394 US 244; 89 S Ct 1030; 22 L Ed 2d 248 (1969). Since *Katz* was such a substantial departure from precedent, the majority did not believe it should invalidate actions taken in reliance on that precedent.

From a situation similar to this case arose the issue in *United States* v *White*, 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971). Although the party who wore the transmit-

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[5] *See* Kitch, *Katz* v *United States: The Limits of the Fourth Amendment*, 1968 S Ct Rev 133; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 NYUL Rev 968 (1968); and Comment, *Permissible Eavesdropping Under the Berger and Katz Standards*, 1969 Tol L Rev 419.

ter was unavailable, the testimony of the agents who listened was admitted. The issue was

> "whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents overheard by monitoring the frequency of a radio transmitter carried by Jackson and concealed on his person. On four occasions the conversations took place in Jackson's home; each of these conversations was overheard by an agent concealed in a kitchen closet with Jackson's consent and by a second agent outside the house using a radio receiver. Four other conversations — one in respondent's home, one in a restaurant, and two in Jackson's car — were overheard by the use of radio equipment. The prosecution was unable to locate and produce Jackson at the trial and the trial court overruled objections to the testimony of the agents who conducted the electronic surveillance. The jury returned a guilty verdict and defendant appealed."

The Court of Appeals had read *Katz* as overruling *On Lee* and reversed defendant's conviction.[6]

Six justices then voted to reverse the Court of Appeals.

In Justice White's plurality opinion, he did not read *Katz* as indicating "in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." Reaffirming his subscription to the *On Lee*, *Lopez*, *Lewis* and *Hoffa* decisions, the justice made this analysis:

> "Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning

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[6] *See* discussion of *White* at 36 Albany L Rev 451 (1972), 47 ND L Rev 172 (1971), 17 Vill L Rev 350 (1971), and 1972 Wash ULQ 137.

them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa* v. *United States,* 385 U.S., at 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez* v. *United States, supra;* (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee* v. *United States, supra.* If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom defendant is talking and whose truthworthiness the defendant necessarily risks."

Justice Black concurred on the basis of his *Katz* dissent indicating that overheard conversations are not protected by the Fourth Amendment.

Justice Brennan, although agreeing with reversal, entered the debate by concluding that *On Lee* and *Lopez* are no longer sound law:

> "In other words, it is my view that current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in *On Lee* and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in *Lopez.*"

The dissenting Justices, Douglas, Harlan and Marshall, also believed that *On Lee* and *Lopez* contained outmoded rules.

If we assume that *Katz* leaves previous holdings undisturbed, we must decide whether the actions in this case violated a justifiable reliance upon the privacy of the home. In *Lopez, Lewis* and *Hoffa,* the Court said when defendant's office or home or room is the scene of unlawful conduct and when the police agent is there with defendant's consent, there is no unconstitutional intrusion upon the defendant's privacy.

If we assume that *Katz* leaves previous holdings undisturbed, we must decide whether the actions in this case violated a justifiable reliance upon the privacy of the conversations. Both *Katz* and *Desist* concern non-consensual electronic eavesdropping upon private conversations by third parties. They do not protect the individual against the possibility that a party to the conversation will broadcast (*On Lee*), record (*Lopez*) or repeat (*Hoffa*) the conversation. The interest isolated and protected by *Katz* is not present here.

If we assume that *Katz* overrides previous holdings, we must determine whether the actions in this case "violated the privacy upon which [defendant] justifiably relied" while using his home as a distribution center for narcotics. In *Katz,* the Court's statement that "the Fourth Amendment protects people, not places" was followed by this explanation:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis* v. *United States,* 385 U.S. 206, 210; *United States* v. *Lee,* 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios* v. *United States,* 364 U.S. 253; *Ex parte Jackson,* 96 U.S. 727, 733."

In *Lewis* a government agent obtained narcotics during transactions completed in the defendant's home after the agent obtained entry by concealing his identity and indicating a desire to purchase narcotics. The Court said introducing the narcotics at trial did not violate the Fourth Amendment.

Katz's reference to *Lewis* indicates that if narcotics sold in the defendant's home can be introduced, certainly conversations accompanying the transaction can be related at

trial without violating the Fourth Amendment. If the conversations are "not a subject of Fourth Amendment protection" then their transmission to the police officers did not violate that provision.

4.

By federal standards and, I assume, by the standards of the majority of this Court, a record from a device taped to Mr. Barker's body would be admissible in evidence as would be testimony by people listening from a closet or at an open window or viewing the premises with binoculars. Conversations can be written down or related to third parties. As a practical matter, monitoring the same consensual conversation through a "walkie-talkie" provides no greater degree of "intrusion."

It serves to encourage defendant's honesty and to protect the life of the agent or informant. He plays a deadly game and the microphone allows him speedy access to help.

Most importantly, it provides a means to protect the courtroom against degrading and flagrant use of perjury.

Further, the very nature of the narcotics trade renders it subject to need for quick action. Otherwise, the "bird will have flown," the opportunity to listen to a "buy" will have been lost. The requirement that the officer first find a magistrate and then try to describe the conversation to be "seized" and the place (under *Katz,* it could be any place, including some sidewalk) where it is to be "seized" and then to go with the warrant (if any) to the scene is designed for self-defeat.

The Court has also failed to indicate exactly when a search warrant is required. Does every instance of consensual third-party monitoring of conversations have to be supported by a warrant even though it is part of an investigation to determine if illegal activity is occurring? How does one specifically describe the conversation to be seized? The Court has given woefully little guidance to those who have to work with this decision.

As noted earlier, if we are to impose controls under the state constitution which are more strict than those required under the United States Constitution, this Court

must assign proper weight to opposing interests and give some consideration to public policy.

The Port Huron officers have interfered with no legitimate constitutional interest. By imposing a warrant requirement the Court has advanced no public or private interest which justifies suppression of the officers' corroborating testimony.

Defendant had no justifiable expectation of privacy in carrying out his sale of heroin. He had no right to traffic in narcotics free from police interference. He assumed a risk that the purchaser would recall, record or transmit the conversation.

The conviction should be affirmed.

(s) Mary S. Coleman

APPENDIX "B"

OPINION OF THE COURT OF APPEALS OF MICHIGAN

STATE OF MICHIGAN
COURT OF APPEALS

DISTRICT II

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
-vs- No. 13215

EDWARD BEAVERS,
Defendant-Appellant.

BEFORE: Quinn, PJ., Bronson and VanValkenburg, JJ.

MEMORANDUM OPINION

Defendant was tried and found guilty of sale of heroin, MCLA §335.152, MSA 18, 1122. He was sentenced to 20 to 40 years in prison and he appeals.

An examination of the record and briefs discloses no prejudicial error.

AFFIRMED.